IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1011 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDUL KARIM UMARBHAI TAI - Appellant(s)
Versus
POWER OF ATTORNEY HOLDER USMAN NOORMOHMAD SHEIKH - Defendant(s)

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Appearance :
MR DAKSHESH MEHTA for Appellant(s) : 1,
MR JB PARDIWALA for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 13/06/2007

ORAL JUDGMENT

1. Present First Appeal has been filed by the appellant herein – original defendant

challenging the judgment and decree passed by the learned 7th Additional Civil Judge (SD), Court No.7, Navsari dated 29.11.2006 passed in Special Civil Suit No. 62/2002 by which the learned trial Court has decreed the said suit in part and granted the relief of partition declaring that the original plaintiff has one half share in the property in question and further directed the learned Collector, Navsari to partition the said agricultural land by which the trial Court has passed a preliminary decree.

2. It is not in dispute that the original plaintiff and the original defendant are the brothers. It is also not disputed by the appellant herein – original defendant that the land in question was the joint family property. It is also not disputed by the appellant herein – original defendant that the original plaintiff is not having one half share in the land in question. The original plaintiff filed the aforesaid suit for partition and declaration that he is having one half share in the property in question and

also prayed for mesne profit. The said suit came to be filed in the year 2002. It was the contention on behalf of the plaintiff that by agreement to sell dated 31.8.2001 in fact, it was agreed to sell his share to the defendant for the sale consideration of Rs. 9 Lacs and Rs. 50,000/- was paid by way of earnest money and the balance amount of Rs.8,50,000/- was to be paid on or before 15.4.2002. It was averred in the plaint that as the aforesaid amount of Rs.8,50,000/- was not paid on or before 15.4.2002, as per the satakhat / agreement to sell dated 31.8.2001 the said agreement was to be treated as cancelled and the amount of Rs.50,000/- was to be forfeited. Having not paid the aforesaid amount of Rs.8,50,000/- and treating the said agreement as cancelled, the plaintiff filed the aforesaid suit for the aforesaid reliefs.

3. The suit was opposed by the original defendant by filing the written statement at Exh.20. It is required to be noted that the defendant denied

having executed any agreement to sell / satakhat dated 31.8.2001 and even payment of Rs. 50,000/- by way of earnest money in the said written statement. The learned trial Court framed the issues at Exh.37. After considering the evidence on record, the learned trial Court decreed the suit in part. Before the learned trial Court, the plaintiff was examined at Exh.62 and the defendant was examined at Exh.90. At the time of hearing of the aforesaid suit, it was contended on behalf of the defendant taking just contrary stand to the stand taken in the written statement at Exh.20 that in fact, the defendant has filed a civil suit for specific performance of the agreement to sell dated 31.8.2001 and it was submitted that the defendant was ready and willing to perform his part as per the agreement to sale dated 31.8.2001, however, as the plaintiff was not available as he was out of the country, he could not pay the balance amount of Rs.8,50,000/-. Therefore, it was submitted that when one half share of the original plaintiff was agreed to be sold to the defendant, it was

requested to dismiss the suit. After considering the evidence on record, oral as well as documentary, and considering the conduct of the defendant, more particularly, the written statement Exh.20 in which the defendant has even denied the execution of the agreement to sell dated 31.8.2001 and considering the subsequent conduct of the defendant that the very defendant has filed civil suit for specific performance of the agreement to sell dated 31.8.2001 and considering the admission on the part of the defendant that the property in question was joint family property and that the plaintiff has one half share in the said property, the learned trial Court decreed the suit by holding that the plaintiff has one half share in the property in question, however, refused to grant the prayer in terms of paragraph – 15(2) i.e. mesne profit. As the property was consisting of agricultural land, the learned trial Court directed the learned Collector, Navsari to partition the same. Being aggrieved and dissatisfied with the same, the appellant herein – original defendant

has preferred the present First Appeal.

4. Shri Mehta, learned advocate appearing for the appellant has submitted that the learned trial Court has not appreciated the evidence in its true perspective and has not properly appreciated the fact that the defendant has filed the civil suit for specific performance of the agreement to sell dated 31.8.2001 and that the defendant was ready and willing to perform his part by making the payment of the balance amount of Rs.8,50,000/- and the admission on the part of the plaintiff in the cross examination with regard to execution of the agreement to sell dated 31.8.2001 and the factum that the plaintiff has agreed to sell his share to the defendant. Therefore, it is requested to allow the present First Appeal.

5. This appeal is opposed by Shri Pardiwala, learned advocate appearing for the original plaintiff. It is submitted that considering the conduct of the defendant taking just contrary

stand that first having denied the execution of the agreement to sell dated 31.8.2001 and subsequently filing the civil suit for specific performance of the agreement to sell dated 31.8.2001 and considering the fact that the property being joint family property is not disputed by the appellant herein and even the fact that the original plaintiff is having one half share being not disputed, it is submitted that the learned trial Court has not committed error in decreeing the suit by holding that the original plaintiff has one half share. Therefore, it is requested to dismiss the present appeal.

6. Heard the learned advocates appearing for the respective parties.

7. As stated hereinabove, it is not in dispute that the property in question was joint family property. It is also not in dispute that the plaintiff has one half share in the property in question. It is the case on behalf of the

original plaintiff that in the year 2001, more particularly, by agreement to sell dated 31.8.2001, the plaintiff agreed to sell his share to the defendant for the sale consideration of Rs. 9 Lacs out of which Rs. 50,000/- was paid. As per the agreement to sell dated 31.8.2001, the balance amount of Rs. 8,50,000/- was required to be paid by the defendant by 15.4.2002. It appears that admittedly the said amount has not been paid, however, it is the contention on behalf of the defendant that as the plaintiff was not available and he was out of the country, he could not make the payment of Rs.8,50,000/-. Whether the defendant was ready and willing to perform his part is required to be considered in the suit which is filed by the defendant for specific performance of the agreement to sell dated 31.8.2001. However, considering the fact that the property in question is the joint family property and that it is not disputed by the defendant that the plaintiff is not having one half share, it cannot be said that the

learned trial Court has committed any error in decreeing the suit for partition and declaring that the original plaintiff has one half share. As stated above, the appellant has also not disputed that the plaintiff is not having one half share. The conduct on the part of the appellant is also required to be considered. Initially, while filing the written statement at Exh.20, the appellant herein in fact, denied the execution of the agreement to sell dated 31.8.2001 and payment of Rs. 50,000/- by way of earnest money, however, subsequently, the very appellant has filed civil suit for specific performance of the agreement to sell dated 31.8.2001. Under the circumstances and as stated above, when it is not disputed that the original plaintiff is having one half share in the property in question, it cannot be said that the learned trial Court has committed any error.

8. Under the circumstances, there is no substance in the present appeal and the same is required to be dismissed and is, accordingly, dismissed.

Notice discharged. No costs. The R. & P. be returned back to the concerned Court forthwith.

[M.R.Shah, J.]

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